No. 89-258

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

vs.

AMERICAN STORES CO., ALPHA BETA
ACQUISITION CORP., AND LUCKY STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CALIFORNIA'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents American Stores Co., Alpha Beta Acquisition Corp., and Lucky Stores, Inc. ("American") urge this Court to avoid deciding now whether petitioner State of California ("California") is entitled to divestiture under section 16 of the Clayton Act (15 U.S.C. § 26). Instead, American counsels the Court to await a final determination by the lower courts whether an acquisition creating a supermarket chain collecting one out of every four grocery dollars spent by Californians, violates section 7 of the Clayton Act (15 U.S.C. § 18). The District Court found that it almost certainly does and the Court of Appeals has affirmed that finding. (Petition for Certiorari, Appendix ("Pet. App.") A, pp. A6, A11.)

The odyssey in quest of divestiture recommended by American is likely to last well into the next decade. During that time 53 of the 62 relevant geographic markets will be controlled by American and the next-largest chain, who will share over 50% of the grocery sales. (ER 691-95,668-69.) This would culminate a fifteen-year trend toward ever-increasing concentration that has resulted in a 50% increase in the number of markets in California which are highly concentrated even as American would postulate the geographic markets. (ER 35.) This competitive disaster is necessary American says because California citizens reside in the Ninth Circuit.

California respectfully submits that this Court cannot countenance the years of injury the courts below found California consumers would endure or the waste of judicial resources such a course compels. It simply makes no sense to require the parties to conduct a trial in order to present another opportunity to review the no-divestiture rule of the Ninth Circuit that has been repudiated in other circuits and has been virtually unanimously condemned by the commentators. Under principles that have long guided this Court, this case should be heard and resolved now.

I.

THIS CASE MEETS THE COURT'S STANDARDS FOR REVIEW OF INTERLOCUTORY ORDERS

American does not dispute this Court's jurisdiction to review the judgment of the court of appeals overturning a preliminary injunction, a matter for which certiorari clearly lies. (28 U.S.C. § 1254(1).) Rather, it argues this case is unworthy of the Court's attention and does not meet historic standards for interlocutory review. American observes that interlocutory appeals are extraordinary — and proceeds to cite twenty-four cases in which such appeals were heard. (See Opposition, pp. 9-11.) Nothing in those cases suggests California's petition fails to meet the Court's criteria for certiorari.

A. This Court Frequently Reviews Interlocutory Issues Fundamental to Ongoing Litigation or Important to National Antitrust Policy

The Court has been particularly willing to undertake interlocutory review to eliminate barriers to effective private enforcement of the antitrust laws. In *Perma Life Mufflers, Inc. v. Intern. Parts Corp.*, 392 U.S. 134 (1968), the Court was presented with another Ninth Circuit decision threatening the effectiveness of private antitrust actions. Despite the District Court proceedings remaining to be conducted under the Court of Appeals' ruling, this Court granted certiorari to review the dismissal of the Sherman Act claims:

> "Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari." (392 U.S. at 136.)

See also *Gulf Oil Corp. v. Copp Paving Corp.*, 419 U.S. 186, 192-93 (1974); *Case-Swayne Co. v. Sunkist Growers*, 389 U.S. 384, 386 (1968).

B. Resolution of the Divestiture Issue is Essential to the Further Conduct of This Case And Should Be Addressed Now to Avoid Grievous Injury to the Public

The importance of California's petition to national antitrust policy, to this case, and to 28 million citizens of this Nation compels review at this time.

1. The Decision Below "Threaten[s] the Effectiveness of the Private Action as a Vital Means for Enforcing the Antitrust Policy of the United States"

The Ninth Circuit's "no-divestiture" holding is precisely the kind of decision that "seem[s] to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States" and is therefore appropriate for interlocutory review. [*Perma Life Mufflers, Inc. v. Intern. Parts Corp., supra*, 392 U.S. 134, 136.)

American agrees that the opinion below renders divestiture unavailable once the parties exchange money and stock but attaches no importance to that fact, declaring "post-merger divestiture a virtual dinosaur." (Opposition, p. 16.) Whatever else must be said of this declaration, it is one which ought to come, if not from Congress, then from this Court. The very claim demonstrates the urgency of immediate review.

American explains that the extinction of post-merger divestiture is the Darwinian result of two forces; (1) availability of pre-merger injunction and (2) the pre- merger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act (HSR) (15 U.S.C. § 18a). Pre-merger HSR review is available only to the federal government and pre-merger relief to the government and industry insiders; it simply does not represent an avenue of effective private enforcement of the antitrust laws.

2. This Case Presents an Issue "Fundamental to the Further Conduct of the Case"

Interlocutory review is most frequent when necessary to resolve an issue "fundamental to the further conduct of the case." *(United States v. General Motors*, 323 U.S. 373 (1945); see also *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947); 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, p. 30 (1988).)

American argues that that standard is not met here because liability remains to be established and remedies short of divestiture are to be considered by the trial court. American's advice requires the Court to ignore the fact that a probable violation of section 7 of the Clayton Act was found by the District Court and affirmed by the Court of Appeals. Once such a violation has been found, this Court teaches that divestiture "should always be in the forefront of a court's mind ...." *(United States v. E.I. DuPont De Nemours & Co.*, 366 U.S. 316, 331 (1961); *Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948).)[1]

This Court has always recognized that effective remedies lie at the heart of section 7 enforcement. If this case is to be tried on remand under the Ninth Circuit's no-divestiture rule, what kinds of relief short of divestiture can be considered? Limits on American's growth? Making essential American facilities available to competitors? Regulation of prices? Divestiture will make it unnecessary to answer these questions; the Ninth Circuit has made it essential. There can be no clearer sign that this issue is "fundamental" to the litigation.

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[1] *DuPont* and *Schine* dispose of American's argument, based on decades-old lower-court decisions, that divestiture is a drastic remedy to be ordered only as a last resort. (Opposition, p. 13.)

3. Immediate Review Is "Necessary to Prevent Extraordinary Inconvenience and Embarrassment"

American's preferred formulation of the standard for interlocutory review is whether an immediate determination of an issue is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." (Opposition, pp. 9, 12, 13, 14, citing *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372 (1893).) It is instructive to compare the course American proposes to the *American Construction* standard.

American would have this Court decline review and remand for trial in the District Court. It would likely take until the middle of the next decade, at the soonest, for this case to be tried, appealed, reviewed by the Court, remanded, and ultimately decided.[2] The "inconvenience" is manifest — not merely to the parties but to 28 million Californians who would have suffered the loss of competition and attendant higher prices in this most fundamental of markets for six years. The "embarrassment" to the system of justice that cannot resolve so pressing an issue in less than seven years is obvious. A trial of the remedy issues without consideration of divestiture — and the attendant waste of judicial, law-enforcement, and private resources — is also an appropriate source of "embarrassment." One can scarcely imagine a case more clearly qualifying under the *American Construction* test.

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[2] Assuming discovery started this month, trial could not begin until 1990. Final judgment is unlikely before early 1991. An appeal taking the same time as this expedited appeal would produce a decision sometime in 1992. This Court might rule on California's petition for certiorari in time for the case to be heard in its 1992-93 term. If California prevailed, sometime in mid-1993 the case would return to the District Court for a trial on remedy. The appellate process would then start over. Final disposition of this case could not occur before the Summer 1995 recess, at which point — seven years after the merger — American would be required to revive a competitive entity dead for six years.

C. The Cases Do Not Support the Additional Conditions American Would Impose on Interlocutory Certiorari

American urges a previously undiscovered "unifying thread" it claims joins the jurisprudence on interlocutory certiorari: such review, according to respondents, "is appropriate only when the issue [to be] decided on review clearly could dispose of the litigation if decided in favor of one party." (Opposition, p. 9.) American offers no policy reason for this Court to so limit its purview, and the cases cited by American dispute any such limitation.

This Court has repeatedly entertained cases where courts of appeals had ruled in favor of defendants on certain claims and remanded for determination of other claims. (*E.g., Gulf Oil Corp. v. Copp Paving Corp., supra,* 419 U.S. 186; *Perma Life Mufflers, Inc. v. Intern. Parts Corp., supra,* 392 U.S. 137; *Case-Swayne Co. v. Sunkist Growers, supra,* 389 U.S. 384.) In other cases, the Court has accepted review despite the fact that the cause was to proceed to trial with other parties. (*E.g., Estelle v. Gamble,* 429 U.S. 97 (1976) (dismissing civil rights action against prison medical director but not addressing claims against other defendants); *Gillespie v. United States Steel Corp., supra,* 379 U.S. 148 (while petitioners' claims were not "formally severable" from the others, they would be heard because resolution was fundamental to the case).)

And the Court has addressed issues of remedy even though the determination would not end the litigation regardless of how the court ruled, just as American claims a decision on California's right to divestiture will not resolve this litigation. (*Carey v. Piphus,* 435 U.S. 247 (1978); *United States v. General Motors, supra,* 323 U.S. 373; *Beacon Theatres v. Westover,* 359 U.S. 500 (1964).

American's gloss on the jurisprudence of interlocutory appeal is unsupported by the cases. And lacking precedential authority, the theory has little else to commend it.

II.

THE NINTH CIRCUIT'S NO-DIVESTITURE RULE EFFECTIVELY PRECLUDES ENFORCEMENT OF SECTION 7 BY NON-FEDERAL PLAINTIFFS REPRESENTING CONSUMERS

American asserts that resolution of the proper scope of relief under section 16 is unnecessary because the issue will only arise when (1) federal agencies do not bring an enforcement action and (2) "a non-federal plaintiff has failed to challenge the transaction before it is completed". (Opposition, p. 18.)

The first condition will, of course, obtain for the vast majority of the thousands of mergers generating HSR filings each year, only a tiny fraction of which the two federal agencies could possibly challenge. And the second condition is the routine, unavoidable circumstance for non-federal plaintiffs outside the affected industry.

A. The Cases Demonstrate That Pre-Merger Injunction Is Feasible Only for Intra-Industry Plaintiffs and the Federal Government

In its eulogy for post-merger divestiture, American offers the consolation that non-federal plaintiffs can always sue to enjoin a merger before it occurs. (Opposition, p. 16.) It cites nine cases where they did to illustrate the ready availability of such relief. (*Id.,* pp. 16, 18.)

Each of the nine cases involves an intramural altercation between firms in the same industry. American cites fights between beer brewers, sugar manufacturers, tea producers, military aircraft manufacturers, machine-tool makers, photofinishers, communications firms, and, appropriately enough, supermarkets. (Opposition at 16.)

Such intra-industry litigation certainly falls within Congress' statutory scheme of public and private enforcement of the antitrust laws, even when "the true concerns of the 'private attorney general' may be more 'private' than 'attorney general.'" (*Grumman Corp. v. LTV Corp.,* 665 F.2d 10,

11 (2d Cir. 1981).)[3] But conspicuously missing from American's list is a *single* case where private interest was not the driving motive.

For a party to seek an injunction against a merger that threatens competition, that party must secure expert consultants, amass detailed market data, satisfy himself or herself that a meritorious section 7 claim exists, and prepare the papers necessary to present a coherent picture of the market to a district court. The essential ingredients — industry-specific expertise and market data — will always be on hand to players in the market well in advance. Outsiders will have to construct the information from scratch — often impeded by confidentiality claims of those who have the information. For this reason, American can point only to intra-industry cases of pre-merger injunctive actions.

B. This Case Demonstrates The Impossibility of Private Action More Swift Than a Takeover

The present case vividly demonstrates the impossibility of effective private enforcement within the time required by the Ninth Circuit's no-divestiture rule.

American's selective recitation of the history of its takeover of Lucky is calculated to support the claim that California had 79 days in which to seek an injunction (Opposition, p. 17), a figure calculated from American's tender offer on March 21, 1988, to its June 9, 1988, completion of the purchase (*id.*, p. 2). However, it was not until May 23 that it became clear who, if anybody, was going to buy Lucky. (Petition at 4.) That left only a narrow 17 day window for commencing this suit before American completed its acquisition of Lucky's stock.

While California did commence its investigation before the agreement was reached — and throughout the period informed American of its concerns and of the possibility of

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[3]The Court ought not rely on competitors to raise antitrust concerns in horizontal mergers. If a merger increases concentration, it relieves both merging and non-merging firms of competition.

litigation should those concerns not be resolved[4]— private antitrust enforcement cannot be based on the assumption that an interested party will prepare for litigation over every hostile offer raising antitrust concerns.

In large measure, this case is before the Court in its present posture because the Federal Trade Commission allowed American to complete its stock purchase while it was putatively conducting its HSR review. California *was* able to complete its analysis and secure a preliminary injunction in the same time it took the FTC to complete its own assessment of the merger — as demonstrated by the fact that California filed the present case the day after final FTC action.

But the record before the District Court demonstrates the impossibility of securing a preliminary injunction during the narrow pre-merger window created by the FTC allowing purchase of the stock during HSR review. While American characterizes the timing of California's action as a failure to exercise "reasonable diligence" (Opposition, p. 19), the District Court found that petitioner "conducted this investigation as swiftly as was responsibly possible." (Pet. App. B, p. B23.) That court actually saw firsthand the evidence California adduced in support of the preliminary injunction and specifically found that swifter action was not reasonably possible. It is plain from the record that if a lawsuit must be filed and preliminary relief secured before the stock is purchased, non-federal parties outside the industry will simply be unable to bring enforcement actions. Whether the window is seventeen days or seventy-nine, the principle is the same: investors launching takeovers will always be able

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[4]The District Court found that California "informed defendants that the State intended to have the procedures comtemplated by the Hart-Scott-Rodino Act run their course . . . and repeatedly warned [American] that failure by the FTC to remedy the State's antitrust concerns could result in this action." (Pet. App. B, p. B23.) American simply ignores that finding. (Opposition, p. 2.)

to buy stock faster than private parties can prove an antitrust case.

CONCLUSION

A fundamental question of antitrust policy will never be presented to this Court more squarely than it is here: whether the Ninth Circuit correctly held that private parties seeking to enforce section 7 of the Clayton Act must secure an injunction before the stock is acquired or be forever limited to injunctive relief "directed at the symptoms rather than the underlying cause" of the antitrust violation (Pet. App. A, p. A20). California respectfully urges the Court to grant the petition and to reaffirm the vitality of private enforcement of the antitrust laws.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On October 5, 1989, I served the within California's Reply Brief in Support of Petition for a Unit of Certiorari in re; "John K. Van de Kamp vs. American Stores Co., Alpha Beta Acquisition Corp., and Lucky Stores, Inc." in the Supreme Court of the United States. October Term 1988 No. 89-258 on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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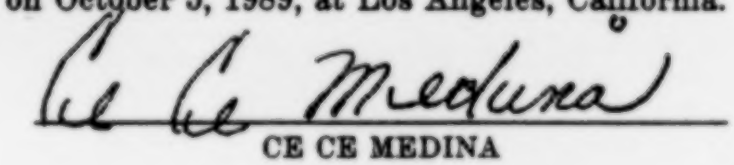
All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 5, 1989, at Los Angeles, California.



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